

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HENRY DAVIDIAN, ) NO. CV 06-7801-E  
Plaintiff, )  
v. ) ORDER RE "PETITION FOR  
MICHAEL J. ASTRUE, COMMISSIONER ) AWARD OF ATTORNEY FEES UNDER  
OF SOCIAL SECURITY ADMINISTRATION, ) 42 U.S.C. § 406(b)"  
Defendant. )  
\_\_\_\_\_  
)

PROCEEDINGS

On May 6, 2008, counsel for Plaintiff filed a "Petition for Award of Attorney Fees Under 42 U.S.C. § 406(b), etc." ("the Petition"), seeking \$11,553. Defendant filed a response on June 5, 2008, purportedly taking no position as to whether the requested fee is reasonable, but listing certain factors for the Court's consideration. The Court has taken the Petition under submission without oral argument. See Local Rule 7-15; May 7, 2008 Minute

1 Order.<sup>1</sup>

2

3 **BACKGROUND**

4

5 Plaintiff filed an application for Title II benefits with the  
 6 Social Security Administration in October 2003, asserting disability  
 7 since August 1, 1999. See Administrative Record, filed May 16, 2007  
 8 ("A.R.") pp. 60-62. After the Administration denied Plaintiff's  
 9 application initially and on reconsideration, an Administrative Law  
 10 Judge ("ALJ") conducted a hearing and issued an unfavorable decision  
 11 (A.R. 18-22, 42-43, 272-314). When the Appeals Council denied  
 12 Plaintiff's application for review, Plaintiff filed an action in this  
 13 Court (A.R. 4-6; Complaint filed on December 8, 2006). On July 30,  
 14 2007, the Court reversed the Commissioner's decision and remanded the  
 15 case for further administrative proceedings. See July 30, 2007 Order  
 16 Adopting Findings, Conclusions and Recommendations of United States  
 17 Magistrate Judge; see also July 10, 2007 Report and Recommendation of  
 18 United States Magistrate Judge. The Commissioner subsequently awarded  
 19 disability benefits to Plaintiff totaling approximately \$75,715.40.  
 20 See Exhibit A filed with the Petition (indicating \$57,162.40 payment  
 21 of past due benefits to Plaintiff and \$18,553 withheld for attorney  
 22 fees).

23

24 Counsel now petitions for \$11,553 in fees for time spent before  
 25 the Court pursuant to 42 U.S.C. section 406(b) and the parties' fee  
 26 agreement. See Petition, pp. 2-3 (requesting \$18,553 withheld, less

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27       <sup>1</sup> The parties filed a consent to proceed before a United  
 28 States Magistrate Judge on June 11, 2008.

1 \$7,000 counsel previously recovered under section 406(a) for time  
2 spent before the Administration); Exhibit B filed with the Petition  
3 (fee agreement).<sup>2</sup> Counsel acknowledges that any fee award must be  
4 offset by the \$2,073.14 in attorney fees that counsel previously  
5 recovered under the Equal Access to Justice Act ("EAJA"). See  
6 Petition, p. 10; 28 U.S.C. § 2412.

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#### **APPLICABLE LAW**

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10 Under 42 U.S.C. section 406(b), the Court may allow attorney  
11 fees in a "reasonable" amount, not to exceed 25 percent of the total  
12 past-due benefits awarded to the claimant. The Court has an  
13 independent duty to ensure that a section 406(b) contingency fee is  
14 reasonable. See id.; Gisbrecht v. Barnhart, 535 U.S. 789 (2002)  
15 ("Gisbrecht").

16

17

Section 406(b)(1) of Title 42 provides:

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Whenever a court renders a judgment favorable to a  
20 claimant . . . who was represented before the court by

21

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22       <sup>2</sup> The Ninth Circuit's recent holding in Clark v. Astrue,  
23 529 F.3d 1211 (9th Cir. 2008) does not affect the present Petition.  
24 In Clark, the Ninth Circuit held that the 25 percent cap on fees  
under section 406(b) is not a cap for total fees awarded under  
25 section 406(a) and 406(b). Id. at 1215-16 (noting that combined  
406(a) and 406(b) fees can exceed 25 percent of past due benefits).  
Here, the parties' fee agreement, which caps total fees at 25  
percent of past due benefits, governs. See Exhibit B to Petition;  
see also Gisbrecht v. Barnhart, 535 U.S. 789, 807 (2002) (noting  
that Section 406(b) "does not displace contingent-fee agreements as  
the primary means by which fees are set for successfully  
representing Social Security benefits claimants in court").

1       an attorney, the court may determine and allow as part  
2       of its judgment a reasonable fee for such  
3       representation, not in excess of 25 percent of the total  
4       of the past-due benefits to which the claimant is  
5       entitled . . . In case of any such judgment, no other  
6       fee may be payable . . . for such representation except  
7       as provided in this paragraph. 42 U.S.C. §  
8       406(b)(1)(A).

9  
10      According to the United States Supreme Court, section 406(b)

11  
12      does not displace contingent-fee agreements as the  
13      primary means by which fees are set for successfully  
14      representing Social Security benefits claimants in  
15      court. Rather, § 406(b) calls for court review of such  
16      arrangements as an independent check, to assure that  
17      they yield reasonable results in particular cases.

18      Congress has provided one boundary line: Agreements  
19      are unenforceable to the extent that they provide for  
20      fees exceeding 25 percent of the past-due benefits.

21      Within this 25 percent boundary . . . the attorney for  
22      the successful claimant must show that the fee sought is  
23      reasonable for the services rendered. Gisbrecht v.

24      Barnhart, 535 U.S. 789, 807 (2002) (citations omitted).

25  
26      The hours spent by counsel representing the claimant and  
27      counsel's "normal hourly billing charge for noncontingent-fee cases"  
28      may aid "the court's assessment of the reasonableness of the fee

1 yielded by the fee agreement." Id. at 808. The Court appropriately  
2 may reduce counsel's recovery

3  
4 based on the character of the representation and the  
5 results the representative achieved. If the attorney is  
6 responsible for delay, for example, a reduction is in  
7 order so that the attorney will not profit from the  
8 accumulation of benefits during the pendency of the case  
9 in court. If the benefits are large in comparison to  
10 the amount of time counsel spent on the case, a downward  
11 adjustment is similarly in order.

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13 Id. (citations omitted); see also Kerr v. Screen Extras Guild, Inc.,  
14 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976)  
15 (identifying factors relevant to adjustment of an attorney's  
16 lodestar figure).

17  
18 **DISCUSSION**  
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20 The Court finds that the "the fee sought is reasonable for the  
21 services rendered." While the fee sought, together with the section  
22 406(a) fee counsel already recovered, equals roughly the agreed-upon  
23 25 percent of past-due benefits, the fee is not unreasonable given the  
24 number of hours counsel spent in representing Plaintiff before this  
25 Court. Neither "the character of the representation" nor "the results  
26 the representative achieved" suggest the unreasonableness of the fee  
27 sought. Plaintiff's counsel was not responsible for any significant  
28 delay in securing Plaintiff's benefits.

1 Counsel, who has been practicing Social Security law since  
2 1979, reports an hourly billing rate of \$490. See Petition at 9.  
3 Counsel reasonably spent a total of 18.9 hours representing Plaintiff  
4 before this Court. See Exhibit C to Petition. If compensated  
5 according to his hourly rate, counsel would receive:

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$$7 \quad \$490.00 \times 18.9 = \$9,261.00$$

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9 If counsel receives the \$11,553 406(b) fee requested (\$18,553 - \$7,000  
10 406(a) fee recovered from the administration), however, counsel will  
11 receive a fee equivalent to roughly 1.25 times this hourly rate (*i.e.*,  
12 \$611.27 per hour) for time spent before the Court. This Court has  
13 previously found rates greater than this *de facto* rate to be  
14 reasonable for section 406(b) fee requests. See, e.g., Hodges v.  
15 Astrue, Case No. CV 05-2829-E, Opinion and Order Granting in Part  
16 Counsel's Motion for Attorney Fees Pursuant to 42 U.S.C. Section  
17 406(b), filed March 28, 2008 (where counsel had not reported any  
18 standard hourly rates, choosing a standard or prevailing hourly rate  
19 of \$250 for counsel (multiplied by a factor of 2.5 for a *de facto*  
20 hourly rate of \$625) as reasonable); Barry v. Astrue, Case No. CV 04-  
21 649-E, Opinion and Order Granting in Part Counsel's Motion for  
22 Attorney Fees Pursuant to 42 U.S.C. Section 406(b), filed December 10,  
23 2007 (same); Cherry v. Astrue, Case No. EDCV 05-393-E, Opinion and  
24 Order Granting in Part Counsel's Motion for Attorney Fees Pursuant to  
25 42 U.S.C. Section 406(b), filed December 3, 2007 (same); Wood v.  
26 Astrue, Case No. CV 01-7622-E, Order Granting in Part Counsel's Motion  
27 for Attorney Fees Pursuant to 42 U.S.C. § 406(b), filed June 11, 2007  
28 (same); see also Gisbrecht, 535 U.S. at 808 (counsel's normal hourly

1 billing rates can aid court's interpretation of reasonableness);  
2 Hodges-Williams v. Barnhart, 400 F. Supp. 2d 1093, 1099-1100 (N.D.  
3 Ill. Dec. 6, 2005) (reducing fees to a *de facto* hourly rate judge  
4 deemed reasonable based on judge's own experience in private practice  
5 and with the court); Lewis v. Barnhart, 2004 WL 3454545 \*1 (W.D. Va.  
6 Jun. 11, 2004) (reducing fees to *de facto* hourly rate generally  
7 approved by court in noncontingency fee cases).

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9 Under the totality of the circumstances, comparison of the  
10 benefits secured and the time Plaintiff's counsel spent on the case  
11 does not suggest the unreasonableness of the fee sought.

12  
13 **CONCLUSION**  
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15 The motion is granted. Section 406(b) fees are allowed in the  
16 amount of \$11,553, to be paid out of the sums withheld by the  
17 Commissioner from Plaintiff's benefits. Counsel shall reimburse  
18 Plaintiff in the amount of \$2,073.14, previously paid by the  
19 Government under the EAJA.

20  
21 IT SO ORDERED.  
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23 DATED: July 25, 2008  
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25 \_\_\_\_\_/S/\_\_\_\_\_  
26 CHARLES F. EICK  
27 UNITED STATES MAGISTRATE JUDGE  
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